Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77- 77-1911

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Appellants,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,

Appellees.

BRIEF OF APPELLEE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Appellees.

Brief of Appellee in Opposition To Petition for a Writ of Certiorari

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STATEMENT

Appellee, Board of Elections of the State of New York submits this brief in opposition to appellants' petition for a writ of certiorari, on the ground that even though the courts below did not utilize the standard which is the subject of the appellants' petition when they dismissed the appellants' complaint, the courts below correctly required the appellants to present proof of

intentional actions in order to state a claim actionable under either 42 U.S.C. 1983 or 42 U.S.C. 1985(3), and accordingly the appellants' petition for a writ of certiorari should be denied.

STATUTES INVOLVED

Title 42 U.S.C. 1983

> "§1983. Civil action for deprivation of rights.
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 U.S.C. 1985(3)

> "§1985 Conspiracy to interfere with civil rights — Preventing officers from performing duties.
>
> • • •
>
> "Depriving persons of rights or privileges
> "(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF CASE

The appellants commenced an action in which they charged the appellees with fraudulent acts and irregular procedures in the conduct of voter registration in 1976 and in the conduct of the subsequent general Presidential election held in November 1976. The appellants alleged that numerous illegal ballots were cast on election day and that the chaos and confusion which existed at the polling places led to further illegal acts. The appellants sought to (1) enjoin the Secretary of the State of New York and the Governor from certifying the Democratic Presidential electors; (2) declare the Presidential election conducted in New York on November 2, 1976, null and void; (3) have the courts direct that a new election be held.

All of the respondents moved to dismiss. The United States District Court for the Eastern District of New York denied the motions to dismiss even though it found that the complaint, as drawn, did not state a claim upon which relief could be granted (p. 69a of Appellants' Appendix). The District Court for the Eastern District of New York, rather than dismiss the complaint with leave to replead, granted the appellants an evidentiary hearing on their request for a preliminary injunction and the court granted the appellees permission to amend the pleadings to conform to the proof presented at the evidentiary hearing.

The District Court held that the appellants must allege and prove:

(1) that specific acts of fraud or other unlawful behavior were committed in the conduct of the election;

(2) the fraud or other unlawful behavior was committed with the intent or purpose of depriving qualified voters of their constitutionally protected right to vote ;
(3) the fraud or other unlawful behavior was committed by persons acting under the color of state law; and
(4) the fraud or other unlawful behavior changed the outcome of the election (p. 69a of Appellants' Appendix).

An evidentiary hearing was held on December 8 and 9, 1976. At the hearing the appellants attempted, through the use of statistical survey techniques, to prove that the November 2, 1976 Presidential election in New York was so permeated with fraud and procedural irregularities that the Presidential electors for President Ford were deprived of their victory. A random sample of 2434 voters uncovered 128 confirmed frauds and 305 unconfirmed frauds. These statistics projected out to a range of 138,027 (minimum) to 306,108 (maximum) irregular votes. The appellants admittedly had a "polling universe" restricted to urban areas in New York State and it was comprised of only 42% of the voter population of New York State. The court found that the appellant's own expert (Dr. George E. Bardwell) testified that the appropriate universe was the entire state (p. 83a of Appellants' Appendix).

The District Court (*Mishler,* C.J.) ruled against a preliminary injunction and held that the appellants had failed to prove (1) specific acts of fraud by persons acting under color of state law and (2) that the irregularities, if eliminated, would have changed the results of the election. The District Court dismissed the complaint.

The appellants sought a stay from the United States Court of Appeals for the Second Circuit, which was denied on December 13, 1976. The appellantes then sought to stay from this Court which was denied on December 27, 1976 (*Marshall,* J.)

Appellants appealed to the United States Court of Appeals for the Second Circuit. The judgment of the District Court was unanimously affirmed without opinion by the United States Court of Appeals for the Second Circuit on May 5, 1977 (p. 114a of Appellants' Appendix).

Appellants now seek a writ of certiorari.

OPINIONS BELOW

The United States District Court for the Eastern District of New York (*Mishler,* C.J.) denied the appellants' motion for a preliminary injunction. The District Court held that the appellants had failed to show that election practices in unsampled voted areas were similar to election practices in sampled areas. It was also held by the District Court that even if the voter sample was proper, the evidence of voting irregularities was susceptible of inferences other than fraud. Finally, it was held by the District Court that even if the court accepted the appellants' contention that 306,107 "fraudulent" votes were cast in New York's urban areas, as a matter of mathematics, the appellants failed to establish that the outcome of the election would have been different in the absence of fraud. There was no evidence of the partisan nature of the vote and even if the District Court generously conceded that 90% of the extrapolated fraudulent vote went to Jimmy Carter, it constituted 275,496 votes or less than the Carter margin of 288,767 votes in New York. In effect, the District Court held that the appellants failed to prove that specific acts of fraud were performed by persons acting under color of state law, or that the irregularities in the voting, if eliminated from the final tally, would have changed the result of the election.

The United States District Court for the Eastern District of New York denied the preliminary injunction and dismissed the complaint.

The United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court.

REASONS FOR DENYING CERTIORARI

A.

THE TRIAL COURT DID NOT UTILIZE THE STANDARD WHICH IS THE SUBJECT OF THE APPELLANTS' PETITION WHEN IT DISMISSED THE APPELLANTS' COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION.

The United States Court of District Court for the Eastern

District of New York (*Mishler*, C.J.) in its Memoranda of Decision and Order dated December 10, 1976 held that:

> "In sum, the plaintiffs, have *failed to prove that specific acts of fraud were performed by persons acting under color of state law or that the irregularities in the voting, if eliminated* from the *final tally, would have changed the result*. Accordingly, the court finds no likelihood that plaintiffs will prevail on the merits." (p. 84a of Appellants' Appendix). (emphasis added).

In the absence of findings that the appellees played an affirmative part in any fraudulent or illegal acts, or that the outcome of the election would have been different in the absence of fraud, the alleged causes of action under 42 U.S.C. §1983 were properly dismissed.

Section 1983 applies to persons who "under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." In the case of *Rizzo* v. *Goode*, 423 U.S. 362, (1976) this Court stated at page 370-371:

> ". . . the plain words of the statute impose liability — whether in the form or payment of redressive damage or being placed under an injunction — only for conduct which 'subjects or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws."

The *Rizzo* case was a class action for injunctive relief brought under 42 U.S.C. §1983 against the Mayor, City Managing Director and Police Commissioner of Philadelphia alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens. Although the District Court failed to find any affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by the defendants showing their authorization or approval of such conduct, it ordered that a review board procedure be implemented to handle citizen complaints. The United States Court of Appeals for the Third Circuit affirmed. This court, however, reversed and stated:

> "Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights securing under the Constituition. Under the well-established rule that federal judiciary powers may be exercised only on the basis of a Constitutional violation, . . . this case presented no occasion for the District Court to grant equitable relief against petitioners." (Id. at 377)

In the case at bar, the District Court, after an evidentiary hearing held on December 8 and 9, 1976 at which the Appellants were permitted to introduce testimony and exhibits of purported evidence of negligent action and acts of omission on the part of the appellees that allegedly violated the appellants' Constitutional rights, found that the appellants did not prove that the appellees had deprived the appellants of any Constitutional rights.

It should also be noted that since the District Court held that as a matter of mathematics the appellants' proof of election irregularities was insufficient to alter the outcome of the election, the criteria set forth in the Memorandum of Decision and Order of December 7, 1976 were never reached or applied by Chief Judge Mishler when he dismissed appellants' cause of action for injunctive relief. Thus, the issue of whether the District Court erred when it required proof of fraudulent intent is really a moot issue.

B.

THE DISTRICT COURT WAS CORRECT IN REQUIRING THE APPELLANTS TO PRESENT PROOF OF INTENTIONAL ACTIONS IN ORDER TO STATE A CLAIM ACTIONABLE UNDER EITHER §1983 OR §1985(3) OF TITLE 42 OF THE UNITED STATES CODE.

The District Court, in its Memorandum of Decision and Order dated December 7, 1976 set forth the requirement that the appellants must show intentional actions by the appellees to deprive the voters of the right to vote. The District Court stated as follows:

> "But before a federal court can responsibly order a new election, the claimants seeking this extraordinary relief must come forward with the most clear and convincing evidence

that state officials or persons acting under color of state law, *by intentionally depriving qualified voters of the right to vote,* altered the outcome of the election. A party contesting a Presidential election carries a heavy burden. Not to put too fine a point on it, this standard implies conduct of a most egregious nature, approximating criminal activity." (69a) (emphasis added)

(a)
Uneven or Erroneous Application of an Otherwise Valid Statute Constitutes a Denial of Equal Protection and Due Process Only if it Represents Intentional or Purposeful Discrimination.

Appellants alleged that the appellees condoned and permitted election irregularities with the result that unregistered persons were permitted to vote, thereby depriving those voters who were properly registered the equal protection and due process of law guaranteed by the First and Fourteenth Amendments to the United States Constitution.* In *Snowdon* v. *Hughes,* 321 U.S. 1 (1943) this Court addressed a similar claim that official action constituted a denial of the equal protection of the laws secured by the Fourteenth Amendment. This Court rejected the claim and stated:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, *it is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."* (*Id.* at 8)

Since *Snowden,* it is clear that a cause of action based upon the Equal Protection Clause of the Fourteenth Amendment requires proof of intent. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* _____U.S. _____, 97 S.Ct. 555 (1977). *Oyler* v. *Boles,* 368 U.S. 448 (1962) and *Powell* v. *Power,* 436 F. 2d 84 (2d Cir., 1970).

Further, the recent case of *Washington* v. *Davis,* 426 U.S. 229 (1976), indicates that this Court will require proof of intent to

*Plaintiffs' Complaint (11-12a)

establish causes of action based on other Constitutional provisions. In *Washington,* a test given to police recruits was challenged as racially discriminatory under the Due Process Clause of the Fifth Amendment. Although the lower courts failed to find any discriminatory purpose on the part of those who established the test, the test was nevertheless held unconstitutional because of its racially disproportionate impact. This Court, however, reversed and held that:

> "Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose." (*Id.* at 230)

In stressing the importance of finding a purpose to discriminate, this Court also noted that the rule is the same in other contexts, citing *Wright* v. *Rockefeller,* 376 U.S. 52 (1964). In *Wright,* a New York Congressional apportionment statute was upheld against a claim that district lines had been racially gerrymandered since there was no proof of an invidious discriminatory purpose on the part of the New York Legislature.

Since *Washington,* this Court has also required proof of intent to state a cause of action under §1983 for a violation of the Eighth Amendment's prohibition against cruel and unusual punishments. See *Estelle* v. *Gamble,* 429 U.S. 97, (rehearing den. 97 S.Ct. 798). Thus, in requiring plaintiffs to provide proof of intentional acts, Chief Judge Mishler followed the standard set for Constitutional causes of action as enunciated in *Washington and Estelle.*

(b)
Not Every Election Irregularity Will Give Rise to an Equal Protection or Due Process Claim.

In *Powell* v. *Power,* 436 F. 2d 84 (2d Cir. 1970) the United States Court of Appeals for the Second Circuit addressed the issue of whether administrative infirmities in an election, in the absence of willful or knowing dilution by illegal voting, create a remedy in the federal courts. As in the instant case, the plaintiffs in *Powell* alleged that State officials permitted voting by persons

not qualified to vote under State law thereby diluting the votes of qualified voters, but they failed to allege that the dilution was willful or knowing.

In affirming the District Court's denial of relief under §1983, the Court said:

> "In the plaintiffs' view, two federal statutes comprehensively protect their ballots against dilution by illegal voting, whether or not the dilution was willful or knowing. It is appropriate to note at the outset that the plaintiffs do not claim any discrimination because of race. Thus, they face a considerable burden of persuasion in asserting so sweeping and novel a conception, one apparently never before asserted, as far as reported cases reveal. Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." (*Id.* at 86)

The *Powell* holding is directly on point to the instant case. Its rationale has been adopted by the Eighth Circuit in *Pettengill* v. *Putnam County R-1 School District, Unionville, Missouri,* 472 F. 2d 121 (8th Cir. 1973), the Seventh Circuit in *Bohus* v. *Board of Election Commissioners,* 447 F. 2d 821 (7th Cir., 1971) and by a district court in *Means* v. *Wilson,* 383 F. Supp. 378 (D.SD. 1974).

(c)
The District Court's Refusal to Invalidate the Election, in the Absence of Proof of Intentional Actions, Was Within Its Discretion as a Court of Equity

The traditional standard for reviewing a denial of equitable relief is whether a district court abused its discretion in denying the relief requested. *Brotherhood of Locomotive Engineers* v. *M-K-T-R Co.,* 363 U.S. 528, 535 (1960); *Williams* v. *Rhodes,* 393 U.S. 23, 65 (1968).

In the District Court, appellants requested equitable relief that was truly extraordinary in nature — the setting aside of the election of New York's forty-one Presidential Electors. Such an

action would have created a serious Constitutional issue as to the proper procedure to be followed under the Twelfth Amendment and might also have thrown the election of the new President into the House of Representatives.

In addition, setting aside the election would have had an even greater chaotic and disruptive effect on the electoral process if the court had both invalidated the results and ordered a new election. This is because New York State's electoral votes would have provided the margin of victory for either of the two major party Presidential candidates, and thus, New York State's voters would have had a role in the selection of the new President far exceeding in importance that consistent with the concept of "one man, one vote."

Accordingly, the District Court exercised great discretion when it balanced appellants' request for injunctive relief with the effects that the granting of such relief would have on the electoral process, and decided to require proof of intentional actions on the part of appellees as a precondition to issuing any order overturning the election.

(d)
In Order to Prove a Cause of Action Under 42 U.S.C. §1985(3), Intentional or Purposeful Discrimination Must Be Established.

Appellants also alleged a cause of action under 42 U.S.C. §1985(3). That section creates a cause of action where "two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . ." However, it is well-settled that in order to prove a cause of action under §1985(3), it is necessary to establish intentional or purposeful discrimination between classes or individuals. See *Griffin* v. *Breckenridge,* 403 U.S. 88 (1971); and *Robinson* v. *McCorkle,* 462 F. 2d 111 (3d Cir., 1972). Thus, the District Court correctly required proof of intent to establish a conspiracy cause of action under §1985(3).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

ed: Albany, New York
August 26, 1977

Respectfully submitted,

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